No. 85-1804

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103
(215) 977-1241

Counsel for Respondent Consolidated Rail Corporation

June 5, 1986

COUNTERSTATEMENT OF QUESTION PRESENTED

Did this Court's adoption of the six-month statute of limitations of Section 10(b) of the National Labor Relations Act for hybrid breach of contract/breach of duty of fair representation cases include the plain statutory requirement that the complaint be both filed and served in order to toll the limitations period?

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Consolidated Rail Corporation ("Conrail") responds to the petition of Thomas West for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in this case.

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure and Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), are set forth in the Petition for Certiorari.

Rule 4(j) of the Federal Rules of Civil Procedure provides:

> (j) If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

COUNTERSTATEMENT OF FACTS

Respondent Conrail agrees with Petitioner that the summons and complaints in this case were mailed to Respondents on October 10, 1984, and Respondents acknowledged service on dates ranging from October 12, 1984, through November 1, 1984. For the purpose of this proceeding, it is undisputed that September 24, 1984, when the Complaint was filed, was less than six months after the statute of limitations began to run, and that both October 10, when the complaints were mailed, and October 12, when the first acknowledgement was made, were more than six months after the statute began to run.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF LAW AND SHOULD BE AFFIRMED BY THIS COURT IN ORDER TO RESOLVE THE DIRECT CONFLICT WITH DECISIONS OF OTHER LOWER COURTS.

As Petitioner has stated, this Court in *DelCostello v. Int'l. Brotherhood of Teamsters,* 462 U.S. 151 (1983), borrowed the six-month statute of limitations from Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), as the most appropriate limitation period for hybrid breach of contract/breach of duty of fair representation suits under the Labor Management Relations Act, 29 U.S.C. §185.

Subsequently, in *Sisco v. Conrail,* 732 F.2d 1188 (3rd Cir., 1984), the Court of Appeals for the Third Circuit held that the Section 10(b) statute of limitations borrowed in *DelCostello* should also apply to hybrid breach of contract/breach of duty of fair representation claims under the Railway Labor Act, 45 U.S.C. §§151-188.

In the last several years, federal courts, interpreting and applying the *DelCostello* decision, have repeatedly addressed the issue of whether or not the adoption of the 10(b) statute of limitations was intended to include its tolling provisions. (*See* Petition, pgs. 5-6.) The resulting decisions conflict.

The language of Section 10(b), on its face, requires both filing and service to toll the limitations period. In addition, adoption of the statute of limitations as a whole, including its tolling provisions, is consistent with the considered analysis of this Court in the *DelCostello* case. Accordingly, this Court should now resolve the existing conflict among circuits by affirming the lower court decision.

In *DelCostello,* this Court adopted the statute of limitations applied in unfair labor practice cases for use in the breach of contract/breach of duty of fair representation context, because of the similarity of rights asserted, and because the considerations forming the basis for the establishment of a limitations period are essentially the same in both cases.

Congress established the Section 10(b) limitations period in an effort to achieve a proper balance between the public interest in prompt and final resolution of labor disputes and the employee interest in having an unjust grievance decision set aside. *DelCostello,* 462 U.S. at 170-171 (quoting *United Parcel Service v. Mitchell,* 451 U.S. 56, 70-71 (1981) (Stewart, J. concurring)). Those same considerations prevail in the breach of contract/breach of duty of fair representation area.

Furthermore, this Court has repeatedly recognized the need for uniformity among procedures followed for similar claims. *United Parcel Service v. Mitchell, supra; DelCostello, supra.* The goals of promptness and finality in the dispute resolution process, and the need for uniformity, are met in this case only if the Section 10(b) statutory language is adopted as a whole, requiring both filing and service of the complaint before the limitations period is tolled.

Petitioner asserts that Rule 3 of the Federal Rules of Civil Procedure should govern the tolling of the limitations period at issue. (Petition, p. 6.) Nevertheless, this Court has noted that the application of Rule 3 as a tolling provision remains an open question. *Walker v. Armco Steel Corp.,* 446 U.S. 740, 751, n.10 (1980). Moreover, application of Rule 3 as a tolling provision in this case would defeat the purpose for which this Court initially borrowed the Section 10(b) statute.

Rule 3 states that an action commences when the complaint is filed. Rule 4(j) of the Federal Rules of Civil Procedure states that service of process must be made within 120 days. If Rules 3 and 4(j) were applied to an unfair representation claim, the six-month limitations period borrowed from Section 10(b) would essentially be extended to ten months.

The purpose of a limitations period is to provide a finite period of time from a date certain after which a potential defendant may legitimately rest with the knowledge that no action can be taken against him. *Walker v. Armco Steel Corp., supra.* Unlike the unfair labor practice situation under Section 10(b), a potential defendant in an unfair representation case would have to wait six months after the action accrued, plus an additional 120 days within which Rule 4(j) permits service, before being certain that a claim was time-barred. This is a significant expansion of the time period contained in Section 10(b) and totally frustrates the goals of promptness and uniformity sought by this Court.

None of the cases which Petitioner cites for the proposition that Rule 3 governs the tolling of the limitations period deals with a statute of limitations which, like 10(b), contains its own tolling provisions. The service of process requirement of 10(b) is part of the express statutory provision. This Court held early on that when the federal courts borrow a state statute of limitations, "... where the service requirement is an integral part of the borrowed state statute, the borrowing embrace[s] both the filing and service requirement...." *Ragan v. Merchants Transfer and Warehouse Co.,* 337 U.S. 530 (1949); *Ellenbogen v. Rider Maintenance Corp.,* 120 LRRM 3365 (S.D.N.Y., 1985).

Further, this Court has stated:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . *In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application.* (emphasis added)

Johnson v. REA, 421 U.S. 454, at 463-464 (1974).

Petitioner raises the specter that various problems will arise if service of process is required in order to toll the statute of limitations in a hybrid breach of contract/breach of duty of fair representation case. Service, however, is controlled by the person filing the charge. Petitioner's arguments that it is impractical to require service are not compelling in light of the public interest in promptness and finality of the resolution of labor disputes and the need for uniformity in limitations periods for similar causes of action.

CONCLUSION

Accordingly, Consolidated Rail Corporation respectfully requests that this Court grant the Petition for a Writ of Certiorari and affirm the lower court's decision, holding that both filing and service are required to toll the 10(b) statute of limitations in hybrid breach of contract/breach of duty of fair representation cases.

Respectfully submitted,

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103
(215) 977-1241

Counsel for Respondent
Consolidated Rail Corporation

APPENDIX A

Listing Pursuant to Supreme Court Rule 28.1

Consolidated Rail Corporation has no parent company. It has the following:

MAJORITY-OWNED SUBSIDIARIES

Calumet Western Railway Company
Conrail Equity Corporation
CRC Properties, Inc.
Indiana Harbor Belt Railroad Company
Merchants Despatch Transportation Corporation
Penn Central Communications Company
Pennsylvania Truck Lines, Inc.
PTL Intermodal, Inc.
St. Lawrence & Adirondack Railway Company

AFFILIATED COMPANIES

Akron & Barberton Belt Railroad Company
Albany Port Railroad Corporation
Belt Railway Company of Chicago
Chicago and Western Indiana Railway Company
Fruit Growers Express Company
Lakefront Dock & Railroad Terminal Company
Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria and Pekin Union Railway Co.
Pittsburgh, Charters & Youghiogheny Railway Company
Trailer Train Company
    Calpro Company
    Delpro Company
    Hamburg Industries, Inc.
    Railbox Company